STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF:

PROPOSED AMENDMENTS TO STANDARDS FOR INTERSTATE AND INTRASTATE SURFACE WATERS, 20.6.4 NMAC

No. WQCC 20-51 (R)

THE BUCKMAN DIRECT DIVERSION BOARD'S PROPOSED STATEMENT OF REASONS

In accordance with the New Mexico Water Quality Control Commission's ("WQCC") Rulemaking Procedures at 20.1.6.304 NMAC, and the Hearing Officer's Procedural Order issued on November 9, 2020, the Buckman Direct Diversion ("BDD") Board submits its proposed Statement of Reasons relating to the 2021 Proposed Amendments to Standards for Interstate and Intrastate Surface Waters at 20.6.4 NMAC, (the "Triennial Review"). On August 19, 2020 the New Mexico Environment Department ("NMED") filed it Petition to Amend the Standards for Interstate and Intrastate Surface Waters, which was subsequently amended by NMED's Amended Petition, filed on March 12, 2021. The Buckman Direct Diversion generally supports the Petition as amended and opposes several proposed amendments to the surface water standards put forward by the Department of Energy ("DOE") in the proceeding, as set forth below. The BDD submitted its Notice of Intent to Present Rebuttal Testimony along with the technical testimony of its witness James P. Bearzi, on June 22, 2021. The BDD submitted rebuttal testimony covering three issues raised by the Technical Testimony of DOE National Nuclear Security Administration and Triad National Security, LLC (collectively "LANL"), including: 1) LANL's proposal to restrict analytical methods and compliance to those approved

by the U.S. Environmental Protection Agency, ("EPA") under 40 CFR Part 136; 2) LANL's proposal to limit the definition of "toxic pollutants" to those listed by the EPA, and NMED's proposal to include contaminants of emerging concern ("CECs") in the definition of toxic pollutants; and 3) LANL's proposal to remove NMED's proposed references to contaminants of emerging concern.

PROPOSED FINDINGS OF FACT

I. BDD'S EXPERT WITNESS

1. The BDD is a municipal water supply project that is jointly operated by the City of Santa Fe and Santa Fe County to divert their San Juan-Chama project water and native Rio Grande water rights, and which is managed by the Buckman Direct Diversion Board. BDD Ex. 1 at 3.

2. The BDD is located west of the City of Santa Fe on the Rio Grande and downstream of several communities and federal Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permittees on the Rio Grande and its tributaries, including the county of Los Alamos, and LANL, which is owned by the DOE and co-operated with DOE by Triad National Security, LLC. BDD Ex. 1 at 4.

3. LANL is located on the Pajarito Plateau, to the west of the Rio Grande, and encompasses watersheds with numerous perennial, intermittent, and ephemeral streams that are tributaries to the Rio Grande, at least two of which are upstream of the BDD intake structure. Numerous sites where pollutants from industrial outfalls and storm water discharge to tributaries of the Rio Grande are located at LANL or lands formerly occupied by LANL and dozens of these sites are in the Los Alamos Canyon watershed, which joins with the Rio Grande approximately three miles upstream of the BDD project intake structure. BDD Ex. 1 at 4

4. In addition to discharges under its NPDES permits, LANL is the site of extensive contamination from past activities, some of which is entrained in the sediments in the canyons that drain the Pajarito Plateau and will periodically migrate downcanyon in response to storm flood events. BDD Ex. 1 at 4.

5. The BDD has engaged with LANL to establish an Early Notification System ("ENS") to alert BDD operators when a storm water event in Los Alamos Canyon is occurring. BDD's only recourse when such events occur is to shut down its intake structure to avoid diverting contaminated waters from the Rio Grande.

6. In addition to the ENS, the BDD relies on the New Mexico surface water quality standards at 20.6.4 NMAC to ensure that discharges to the Rio Grande and its tributaries upstream of the BDD intake are appropriately regulated to protect human health and the environment. The BDD also relies on these standards as part of the regulatory framework that ensures the cleanup of legacy pollution at LANL. BDD Ex. 1 at 5.

7. The BDD presented one witness, Mr. James P. Bearzi, at the hearing on this matter.

8. At the time of the hearing Mr. Bearzi was employed by Glorieta Geoscience, Inc. ("GGI") as a Senior Environmental Geologist.[1] Mr. Bearzi has a Bachelor of Science degree in geology and geography from Portland State University and a Master of Science degree in Earth Sciences from Montana State University. From 1989 to 2012 Mr. Bearzi served in various technical, scientific, and leadership positions within the NMED, including serving as Bureau Chief for 21 years, including a period as Surface Water Quality Bureau Chief. As Surface Water Quality Bureau Chief Mr. Bearzi oversaw and was responsible for the management of New

[1] Mr. Bearzi has since left employment with GGI.

Mexico's surface water quality protection programs, including those required by the CWA, the New Mexico Water Quality Act, and the Water Quality Standards for Interstate and Intrastate Surface Waters at 20.6.4 NMAC. Mr. Bearzi has provided technical testimony before the WQCC, including in the 2012 petition to amend the designated uses for the lower Dry Cimarron River, and to establish water quality standards for New Mexico lakes. Prior to serving as Surface Water Quality Bureau Chief, Mr. Bearzi served as the Hazardous Waste Bureau Chief, where he was responsible for the regulation of cleanup and monitoring of hazardous and mixed waste at LANL. Mr. Bearzi's extensive experience at NMED included providing testimony in litigation, administrative proceedings, and to legislative bodies; developing and implementing public policy, regulations, and statutes; and managing the technical and administrative aspects of large agency organizations. BDD Ex. 1, at 3. Mr. Bearzi's resume is included in the record as BDD Ex. 2.

II. ANALYTICAL METHODS: 20.6.4.12.E NMAC COMPLIANCE WITH WATER QUALITY STANDARDS.

9. LANL proposed to amend the existing language at 20.6.4.14.E NMAC as follows:

> E. The commission may establish a numeric water quality criterion at a concentration that is below the ~~minimum quantification level~~ lowest minimum level (ML) of the analytical methods approved by EPA under 40 CFR part 136 for the measured pollutant or pollutant parameter. In such cases, the water quality standard is enforceable at the ~~minimum quantification level~~ ML of the sufficiently sensitive method approved by the EPA under 40 CFR part 136. [2]

LANL Ex. 2, at 11.

[2] Proposed deletions from the existing rule are indicated by strikethrough, i.e., ~~deletion~~. Proposed additions to the existing text are indicated by underline, i.e., addition.

10. The practical effect of LANL's proposal is that contaminants like polychlorinated biphenyl compounds ("PCBs") in LANL surface and storm waters that are detectable under the current rules would be undetectable and unenforceable going forward. BDD Ex. 1 at 8.

11. The current rule, set out at 20.6.4.14.E, provides that the water quality standard is enforceable at the minimum quantification level set forth in the allowed method. For example, the WQCC has established use-specific numeric criteria for PCBs of 0.014 micrograms per liter ("µg/L") for Wildlife Habitat and Aquatic Life Chronic and 0.00064 µg/L for Aquatic Life Human Health-Organism Only (20.6.4.900.J(1) NMAC), which are less than the equivalent minimum quantification level of Part 136 Method 608.3. BDD Ex. 1 at 6.

12. The WQCC's current regulations take account of the fact that Part 136 Methods may not be sufficiently sensitive to detect contaminants at the numeric limits set by the WQCC for certain contaminants, and has adopted a number of sampling and analysis techniques for use by NMED, in addition to those approved under 40 CFR §136 (*see* 20.6.4.14.A. NMAC). One such category of techniques or laboratory analysis of waste samples for monitoring and compliance purposes is "*Methods for Chemical Analysis of Water and Waste*, and other methods published by EPA office of research and development or office of water." (20.6.4.14.A.(3) NMAC). The NMED therefore requires that monitoring and reporting of PCBs by LANL be performed in accordance with Method 1668C or later revisions. BDD Ex. 1 at 6-7.

13. Method 1668C is therefore allowed as the only available method to detect PCBs at concentrations at or below the WQCC current numerical standards. NMED has stated in its *State Certification Los Alamos National Laboratory Industrial Wastewater NPDES Permit No. NM0028355* that "Method 1668C is a State approved method for testing surface wastewater discharges. Additionally, Method 1668C has a Minimum Quantification Level (MQL) set at or

below the applicable and limiting state standard set forth at 20.6.4.900(J)(1) NMAC. BDD Ex. 1 at 7; BDD Ex. 6.

14. Six of the 17 NPDES Individual Permit site monitoring areas where automated samplers collected compliance storm water samples in 2019 are in the Los Alamos Canyon watershed. In 2019 ***every*** storm water or base flow result for total PCBs measured by LANL exceeded the Human Health-Organism Only water quality standard. BDD Ex. 1, at 8; BDD Ex. 8 at 6-25.

15. The minimum detection limits for Method 608.3, which is a Part 136 Method, are not sufficiently sensitive to detect PCBs at the numeric water quality standards under the current rule. BDD Ex. 1, at 9; AB Ex. 22 at 2-3.

16. Adopting the LANL proposal to limit enforcement of water quality permits to the minimum level detectable under a Part 136 method would undermine the ability of NMED to enforce the Commission's numeric water quality standards for certain contaminants, including PCBs, under undermine the Water Quality Act's purpose of preventing, abating, and controlling water pollution in the state. NMSA 1978 § 74-6-13.

III. TOXIC POLLUTANTS: 20.6.4.7.T(2) NMAC DEFINITIONS

17. LANL has proposed to amend the current definition of toxic pollutant at 20.6.4.7.T(2) as follows:

> (2) "Toxic pollutant" means those pollutants, or combinations of pollutants~~, including disease causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly be ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairment or physical deformations in such organisms or their offspring~~ listed by the EPA administrator under section 307(a) of the federal Clean Water Act, 33 U.S.C. §1313(a) or in the list below.

LANL Ex. 1, at 4.

18. LANL's proposed definition would limit what are considered to be toxic pollutants from the current narrative definition, to those listed by EPA under the Clean Water Act at § 307(a), or under a list adopted, through rulemaking, by the WQCC. BDD Ex. 1 at 9.

19. Replacing the current narrative definition of toxic pollutants with EPA's list of toxic pollutants would take away the State's authority to protect New Mexico waters from contaminants that have been well-established by the scientific community as "toxic," but that have not gone through the lengthy and cumbersome rulemaking process that EPA must undertake to add to its definition of toxic pollutants. *Id*.

20. The general water quality criteria at 20.6.4.13.F(1) NMAC provide that the surface waters of the state shall be "free of toxic pollutants, from other than natural causes in amounts, concentrations, or combinations that affect the propagation of fish or that are toxic to humans, livestock or other animals, fish or other aquatic organisms…" 20.6.4.13.F(1) NMAC.

21. The state should have the flexibility and discretion, relying on good science, to use the existing narrative definition of toxic pollutants combined with the general water criteria for state surface waters to protect the public and environment from contaminants that are toxic in nature, but have not been described as such by a formal rulemaking. BDD Ex. 1 at 9.

22. LANL's proposed amendment to the definition of toxic pollutants is contrary to the purpose of the Clean Water Act, that "it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited," 33 USC § 1251(a)(3) and the purpose of the Water Quality Act which aims to prevent and abate water pollution in the state." NMSA 1978 §74-6-13.

IV. CONTAMINANTS OF EMERGING CONCERN: 20.6.4.7.C(7) NMAC, DEFINITIONS; 20.6.4.13.F NMAC, GENERAL CRITERIA

23. LANL has proposed to delete the NMED proposed amendment to the Definitions section under NMAC 20.6.4.7.C(7) that would add a definition of contaminants of emerging concern:

> (7) "Contaminants of emerging concern" or "CECs" refer to water contaminants including, but not limited to, pharmaceutical and personal care products that may cause significant ecological or human health effects at low concentrations. CECs are generally chemical compounds that, although suspected to potentially have impacts, may not have regulatory standards, and the concentrations to which negative impacts are observed have not been fully studied.

NMED Amended Petition, at 7; NMED Ex. 110 at 3. LANL proposes to reject this amendment. LANL Ex. 1 at 2.

24. CECs include pharmaceuticals, personal care products, polyfluorinated alkyl substances ("PFAS"), and other chemicals that do not have regulatory standards but are suspected to have adverse ecological or human health effects. BDD Ex. 1, at 10.

25. Some CECs, including three PFAS compounds, are listed as toxic pollutants in the Ground and Surface Water Protection regulations at 20.6.2 NMAC. *Id*.

26. PFAS have recently been detected in groundwater beneath the Pajarito Plateau. BDD Ex. 9.

27. LANL's proposal would remove NMED's authority to require further sampling for PFAS or any other CEC in either surface water or storm water. BDD Ex. 1, at 10.

28. NMED has further proposed to amend 20.6.4.13(F) NMAC to include CECs within the definition of toxic pollutants. NMED Amended Petition, at 6.

29. Without clearly stated criteria for CECs, including CECs in the definition of toxic pollutants conflates CECs with toxic pollutants and presumes that CECs have the characteristics of toxic pollutants even where no such determination has been made. BDD Ex. 1 at 10.

30. The BDD supports NMED's definition of CECs in the amended petition at 20.6.4.7.C(7) but opposes NMED's proposed amendment to 20.6.4.13.F that would include CECs within the general criteria for toxic pollutants. *Id*.

31. In his testimony at the hearing on this matter Kris Barrios, Program Manager for the Monitoring, Assessment, and Standards Section of NMED acknowledged that including CECs within the definition of toxic pollutants may create ambiguity and added "[t]o avoid the mistaken assumption that all CECs are toxic pollutants, the Commission may wish to reference CECs in the general criterion for toxic pollutants as "those CECs meeting the definition of toxic pollutants." Tr. 457:6-10.

32. The BDD supports NMED's proposed definition of CECs as set forth in its Exhibit 110 and so that NMED may establish and impose monitoring requirements for CECs when conditioning federal Clean Water Act permits. BDD Ex. 1 at 11.

33. Under the CWA, NMED has the authority to condition EPA issued permits to require monitoring of discharges for CECs in compliance with state water quality requirements. 33 USC 1341(d).

For the foregoing reasons, the BDD respectfully requests that the WQCC consider its Statement of Reasons as to the three matters set out above, in its rulemaking proceedings in the Proposed Amendments to Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing pleading was emailed to the WQCC Administrator and the following listed counsel on September 24, 2021.

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